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UNITED STATES DISTRICT COURT

9

NORTHERN DISTRICT OF CALIFORNIA

10 MERAS ENGINEERING INC., a California
corporation, RICH BERNIER and JAY
11 SUGHROUE,

12 Plaintiffs,

13 v.

14 CH₂O, Inc., a Washington Corporation,

15 Defendant(s).

Case No. 11-0389 LB

PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO MOTION TO DISMISS

Date: May 5, 2011
Time: 11:00 AM
Dept: Courtroom #4
Judge: Hon. Laurel Beeler

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I.
INTRODUCTION

This case involves a dispute between an employer, two former employees and their new employer. The employees, plaintiffs in this action, ask this court to make a determination that they may continue to work for their new employer, that what their former employer is trying to do is in violation of the law, that they may continue to work in their chosen field, and that should not be required to send 25% of their new income to their former employer as liquidated damages. The employees' current employer asks that the court allow their new employees to contact clients, sell its product and service its customers.

Defendant/former employer asks this court to dismiss this action. The statutory basis of that dismissal request is unclear but the gist of it is that defendant wants the matter to proceed in another court. After this action was filed, defendant filed its own action in the Western District of Washington. Defendant (there the plaintiff) asks this court to dismiss this action so that it can proceed in that second-filed action.

II.
PARTIES AND THEIR COUNSEL

Plaintiffs are Rich Bernier, Jay Sughrue and their new employer, Meras Engineering. All three are represented by Dawn Ross and Philip J. Terry of Carle, Mackie, Power and Ross, LLP in Santa Rosa. All three are California residents.

Defendant is CH2O, the former employer of Mr. Bernier and Mr. Sughrue. CH2O is a Washington corporation. CH2O is represented by Peter Petrich, *Pro Hac Vice*, of Davies Pearson, P.C. in Tacoma Washington and by James Smith of Smith, Lillis Pitha, LLP in San Francisco.

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III.

PROCEDURAL POSTURE

This case was filed on January 26, 2011. It contains a request for declaratory relief and asserts unfair competition claims against defendant CH2O. The focus of the complaint is the employment contracts between CH2O and Mr. Bernier and Mr. Sughrue. That complaint was served on February 10, 2011. The complaint was later amended to add additional claims. The amended complaint was filed on February 28, 2011 and served on March 10, 2011.

In response to this action, defendant filed its own action. [Exhibit A]. Defendant's action asserts that the employment contracts are valid and binding and it asks for declaratory relief as to the validity of those contracts. Defendant filed the second action in the Washington State Superior Court and the case was timely removed to the United States District Court for the Western District of Washington. [Exhibit B]. It is designated as case number 3:11-cv-05153-RJB.

The Washington case is still pending, although a motion to dismiss is before that court. Because of the second-filing nature of that action, plaintiffs in this action (defendants in the Washington case) filed a motion to dismiss the Washington action. The grounds for dismissal of the Washington case are the First To File Rule, lack of jurisdiction over the defendants in that action, discretionary transfer under 28 U.S.C. § 1404(a) and *forum non conveniens*. That motion has been fully briefed but no hearing date has been set by the court.

IV.

EXHIBITS

Exhibit Designation	Description of the Exhibit	Date of the Exhibit
A	Defendant CH2O's complaint.	02/02/11
B	Notice of Removal to the United States District Court for the Western District of Washington.	02/24/11
C	Declaration of plaintiff Rich Bernier: USDC (W.D. Wash). <ul style="list-style-type: none">• This declaration references an	03/03/11

	Exhibit A (the subject employment agreement); that employment agreement/exhibit is separately attached to this motion as Exhibit D, below.	
D	Employment Agreement of Rich Bernier (originally attached as Exhibit A to the 3/3/11 Declaration of Rich Bernier submitted to the USDC W.D. Wash)	12/02/09
Separately filed document	Declaration of plaintiff Rich Bernier: USDC (N.D. Cal).	04/14/11
E	Declaration of plaintiff Jay Sughroue: USDC (W.D. Wash). <ul style="list-style-type: none"> This declaration references an Exhibit A (the subject employment agreement); that employment agreement/exhibit is separately attached to this motion as Exhibit F, below. 	03/03/11
F	Employment Agreement of Jay Sughroue (originally attached as Exhibit A to the 3/3/11 Declaration of Jay Sughroue submitted to the USDC W.D. Wash)	
Separately filed document	Declaration Of Plaintiff Jay Sughroue: USDC (N.D. Cal).	04/14/11
G	Declaration of Bryan O'Connell of plaintiff Meras Engineering: USDC (W.D. Wash).	04/07/11
Separately filed document	Declaration of Philip J. Terry in opposition to motion to dismiss.	04/14/11
H	Letter from counsel for CH2O, Peter T. Petrich, to plaintiffs' counsel, Dawn M. Ross.	01/31/11

V.

STATEMENT OF THE CASE

Plaintiff Rich Bernier has been a California resident since 1994. [Exhibit C, 2:16-17]. When he moved there, he was an employee of defendant CH2O. [Exhibit C, 2:15-17]. CH2O terminated his employment about a year later. [Exhibit C, 2:17-20]. Mr. Bernier ran two other water-related companies over the years until CH2O asked him to return to its employment in early 2007. [Exhibit C, 2:21-3:16]. He agreed. [Exhibit C, 3:20-21].

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1 Mr. Bernier worked again for CH2O from 1997 to early 2011. [Exhibit C, 3:21-23;
2 5:16]. This second round of employment came with an employment contract containing
3 several provisions which are contrary to California law. [Exhibit D; Exhibit C, 3:24-27].
4 The agreement indicates that he may not be involved in any business similar to
5 defendant's for three years after leaving his employment with defendant and that he
6 may not sell to anyone that was once a customer of defendant for that three-year period
7 as well¹. [Exhibit D, ¶1(K)(6)(a)-(b)].

8 The agreement written for Mr. Bernier also contained a liquidated damages
9 provision. [Exhibit D, ¶J(9)]. The language of this paragraph is not the clearest ever
10 written but potentially exposes Mr. Bernier to paying defendant 25% of all sales Mr.
11 Bernier makes for some indeterminate time. [Exhibit D, ¶J(9)]. Because Mr. Bernier
12 now works for another company, plaintiff Meras Engineering, it would seem that Meras
13 Engineering would be exposed to that liquidated damages provision of 25% of all sales
14 made.

15 The entire time that Mr. Bernier worked for defendant, he lived and worked in
16 California. [Exhibit C, 1-3]. He signed the employment contract in California and served
17 California customers. [Exhibit C, 4:3-7]. He did not live in Washington, he did not work
18 in Washington, and he did not sell to customers in Washington. [Exhibit C, 4:1-9].

19 Jay Sughrue is a plant geneticist who has lived in California for ten years.
20 [Exhibit E, 2:15-16]. He worked for CH2O from December of 2009 until January of
21 2011. [Exhibit E, 3:7, 4:22]. He, too, signed an employment contract with defendant
22 CH2O. [Exhibit E 3:9-11]. That agreement contained similar provisions to the one that
23 defendant wrote for Mr. Bernier. [Exhibit E, 3:7-11; Exhibit F]. The language of the
24 agreement indicates that Mr. Sughrue may not work for any similar business for two

25 ¹ While defendant's motion states that defendant has no intention of keeping either Mr.
26 Bernier or Mr. Sughrue from working for Meras Engineering, the underlying case in
27 USDC, W.D. Wash asks for an injunction against exactly that. [Exhibit A, ¶2.2, Prayer,
¶1-2].

28 Moreover, correspondence from defendant's counsel indicates that defendant very
much intends to seek liquidated damages from Mr. Bernier even while at the same time
saying that CH2O was not going to enforce the noncompete clause. [Exhibit H].

1 years and that he may not sell to anyone who was a customer of defendant in the last
2 two years. [*Id.*] There is no liquidated damages language in Mr. Sughrue's
3 agreement. [*Id.*]

4 Both defendants now work for a California company, Meras Engineering, Inc.
5 [Exhibit C, ¶18; Exhibit E, ¶22]. They are establishing contacts with customers in
6 California, selling to California customers, and servicing those California customers.
7 [Dec. of Rich Bernier, ¶2; Dec. of Jay Sughrue, ¶2].

8 Most, if not all, of the witnesses in this case will be California residents. The new
9 employer, Meras Engineering, is a California company located entirely within the State
10 of California. [Exhibit G, ¶4]. There are at least five employees of Meras Engineering
11 with knowledge of facts pertinent to the claims asserted between the parties; each of
12 these persons is a California resident. [Exhibit G, ¶7]. The big customer in dispute is a
13 California office of Crop Production Services ("CPS"); the persons at CPS with
14 information germane to the dispute number at least a dozen and they are all California
15 residents. [Exhibit G, ¶9, ¶10, ¶11]. Dozens more people are current customers of
16 plaintiff Meras Engineering; all of those customers are California residents. [Exhibit G,
17 ¶8, ¶11]. In addition, each of the plaintiffs is a California resident. [Exhibit C, 2:16-17;
18 Exhibit E, 2:15-16; Exhibit G, 1:24-27].

19 VI.

20 ARGUMENT

21 The motion properly fails for several reasons. First, there is nothing in the Motion
22 on which to base relief; the motion is a factual recitation without reference to statute or
23 case law. Second, the points and authorities use an incorrect body of law for the facts
24 of our case. Finally, the First To File Rule patently applies to this case and indicates
25 that this first-filed action is the proper action in which the parties can litigate their
26 differences.

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1 **A. Procedural Irregularities With The Moving Papers**

2 No legal basis for the motion is stated in the Motion papers. [Motion to Dismiss
3 Plaintiff's Complaint, 2:1-2:12]. There is no reference to any part of 12(b) and there is
4 no reference in the Motion to any case or statute that would otherwise provide relief. *Id.*
5 Plaintiffs respectfully request that the Motion be denied because of the motion's failure
6 to state with particularity the grounds on which it is made. FRCP 7(b)(1)(B). Indeed,
7 the "Motion" is more of a factual recital than a statement of the legal basis on which it is
8 brought. [Motion to Dismiss Plaintiff's Complaint, 2:1-2:12].

9 **B. Defendant's Memorandum Of Law Is Not Helpful To Defendant's Position**

10 Defendant misunderstands the applicable law in this case. The law to which
11 defendant cites is law for a different factual and procedural situation. Defendant
12 appears to be asking this court to apply the declaratory relief abstention². On first
13 blush, that doctrine - - if only by its name alone - - would appear to be the correct line
14 of cases to use. However, the correct body of law for this motion is the First To File
15 Rule.

16 The declaratory relief abstention is invoked when the parallel action is a state
17 court action. "Federal courts have discretion to decline to hear federal declaratory relief
18 suits where a parallel action is pending in state court involving the same issues and
19 parties." Rutter, Federal Civil Procedure Before Trial, ¶12:1329.11 (emphasis added).

20 Defendant's reliance on the declaratory relief abstention starts with a reference to
21 the seminal case on that doctrine: *Brillhart v. Excess Insurance Co.* 316 U.S. 491
22 (1942). [Moving party's Motion to Dismiss, 5:16-21; 6:6-20]. That case specifically
23 refers to a parallel *state court* proceeding. *Brillhart* 316 U.S. at 495. "Where a District
24 Court is presented with a claim such as was made here, it should ascertain whether [the
25 matter] can better be settled in the proceeding pending in the state court." *Id.*

26
27 ² Again, it is not clear on what basis the motion seeks relief, but an examination of the
28 cases used to support the motion indicates a reliance on *Brillhart* and its progeny which
deal with the declaratory relief abstention. *Brillhart v. Excess Insurance Co.* 316 U.S.
491, 495 (1942).

1 (emphasis added).

2 Perhaps the most often-cited case in the moving papers is *Wilton*. *Wilton v.*
3 *Seven Falls Co.* 515 U.S. 277 (1995). [Moving party's Motion to Dismiss, 6:1-2; 8:18-
4 9:6]. *Wilton*, too, refers only to the situation of the second action being in state court.
5 The case resolved the differences between two approaches in that particular procedural
6 setting: one District Court case and one case pending in a state court. "This case asks
7 whether the discretionary standard set forth in *Brillhart* . . . or [a different standard in
8 another case] governs a district court's decision to stay a declaratory judgment action
9 during the pendency of parallel state court proceedings." *Wilton*, 515 U.S. at 279
10 (emphasis added). The court ruled that *Brillhart*'s discretionary standard was the
11 applicable standard in such situations. *Wilton*, 515 U.S. at 289-290.

12 Being a matter of civil procedure, often the applicable Rutter treatise is helpful.
13 Rutter, Federal Civil Procedure Before Trial. There, the only place that *Wilton* and
14 *Brillhart* are mentioned is in the context of the declaratory relief abstention and a
15 pending state court action³. See Rutter, Federal Civil Procedure Before Trial, ¶10:45 *et*
16 *al.* Indeed, *Brillhart* and *Wilton* both appear as explanatory cases under the general
17 heading of "Effect Of Parallel Action Pending In State Court ("Reactive" Federal Action).
18 Rutter, Federal Civil Procedure Before Trial, ¶10:50 *et seq.*

19 However, just a few paragraphs after Rutter's mention of *Brillhart* and *Wilton* is a
20 reference to the situation we have in our case: "Parallel Proceeding Pending In Other
21 Federal District Court." Rutter, Federal Civil Procedure Before Trial, ¶10:50.1. There,
22 we are told to use the First To File Rule. *Id.* at ¶10:50.2.

23
24 ³ An exemplar reference in Rutter to *Brillhart* reads: "The goals for a district court to
25 follow in deciding whether to exercise jurisdiction in a declaratory relief judgment action
26 when a parallel action is pending in state courts are: [enumeration of factors]." Rutter,
27 Federal Civil Procedure Before Trial, ¶10:53, emphasis added, citing to *Brillhart*, 316
28 U.S. at 495.

29 An exemplar reference in Rutter to *Wilton* reads: "A federal court's *broad*
30 *discretion to abstain in declaratory relief actions empowers it to stay or dismiss* such
31 actions in favor of pending state court proceedings involving the same issues and
32 parties." Rutter, Federal Civil Procedure Before Trial, ¶10:50, citing to *Wilton* 515 U.S.
33 at 287-289 (*italics in original, other emphasis added*).

1 As such, the moving papers are misplaced to ignore the First To File Rule.
2 Although the name of the doctrine, declaratory relief abstention, seems to lean to
3 defendant's side of the argument, the doctrine is inapplicable to this case. In short, the
4 moving papers use the wrong body of law to support their motion and the motion to
5 dismiss may properly be denied.

6 **C. The First-To-File Rule**

7 The First To File Rule is "well-established" and is not to be "disregarded
8 lightly." *Alltrade, Inc. v. Uniweld Products, Inc.* 946 F.2d 622, 625 (9th Cir. 1991).

9 Under this Rule, this case properly remains in the Northern District of California.
10 *Id.* In *Alltrade*, the parties disagreed about a trademark registration. One party filed suit
11 in the Southern District of Florida. A day later, the other party filed a similar suit in the
12 Central District of California. Defendants in the second action (plaintiffs in the first)
13 brought a motion to dismiss; the second-filed court applied the First To File Rule and
14 granted the motion. The Ninth Circuit agreed that the First to File Rule applied and that
15 the matter was to be litigated in the first-filed action⁴.

16 Both of the requisite factors for application of the First To File Rule had been
17 met. *Id.* First, the court where the motion to dismiss was pending had been the
18 second-filed court. Second, there was sufficient identity of parties and issues at stake.
19 *Id.* Whatever concerns the parties may have had about similarity of issues were for the
20 first-filed court to decide. *Id.* at 627. None of the exceptions to the First To File Rule
21 applied. *Id.* at 627-628. There are essentially three such exceptions: bad faith filing,
22 anticipatory suit, and forum shopping. *Id.* The appellate court does not interfere with
23 the sound discretion of the trial court to make decisions about the applicability of an
24 exception. *Id.*

25 In our case, the elements of the First To File Rule are similarly met. This court is
26 the first-filed court and the issues and parties are the same between the two actions.

27
28 ⁴ The court decided on a stay rather than a dismissal, however, because of the
trademark issues involved.

1 Defendants admit this. [Motion to Dismiss, 2:6-9]. Defendant's second-filed action is
2 "involving the same issues and parties are as involved in the present action." *Id.*

3 The First To File Rule has been raised and extensively briefed in the parallel
4 action pending in the Western District of Washington⁵. There, these plaintiffs
5 (defendants there) base their motion to dismiss that action in large part on the First To
6 File Rule. Defendant here (and plaintiff there) tried very much to squeeze the facts into
7 one of the exceptions to the First To File Rule. In doing so, that party tried to show that
8 this first-filed action was an "anticipatory suit."

9 However, the term "anticipatory" has a special meaning in the context of the First
10 To File Rule. *Intersearch Worldwide, LTD v. Intersearch Group, Inc.* 544 F. Supp.2d
11 949 (N.D. Cal. 2008). "A suit is anticipatory for the purposes of being an exception to
12 the first-to-file rule if the plaintiff in the first-filed action filed suit on receipt of specific,
13 concrete indications that a suit by the defendant was imminent." *Id.* at 960. A
14 suggestion of legal action is not sufficient. *Id.* An apprehension is not sufficient. *Id.*
15 "[T]here is no requirement that a business threatened with the *possibility* of [a lawsuit]
16 wait to be served." *Id.* at 961, emphasis in original.

17 Therefore, even if moving party had raised the First To File Rule in its motion to
18 dismiss this action, and even if it had raised the issue of an exception to that Rule, no
19 exception applies here. There are no facts to show that there was any communication
20 from defendant about any imminent suit. Even if there was an apprehension of such a
21 suit by these plaintiffs, that is not "anticipatory" for purposes of the Rule. As in
22 *Intersearch*, there is no requirement that these plaintiffs wait for service of a lawsuit. *Id.*

23 **D. A Review Of Defendant's Motion Shows No Merit To The Motion**

24 Defendant lists six "grounds" for its motion to dismiss. [Motion to Dismiss, 2:1-
25 2:5]. None of them are a proper basis for the motion. These six grounds are as follows:

- 26 1. That the two District Court cases involve the same issues and parties.

27
28 ⁵ It is interesting that there is no mention of the First to File Rule in this motion to
dismiss since the issue was raised by plaintiffs (in that case defendants) in their motion

1 [Motion to Dismiss, 2:6-10]. This is not a basis for a motion and, indeed, the factual
2 recitation only supports plaintiff's argument that the First To File Rule should apply.

3 2. That the second action is pending in the Western District of Washington and
4 that plaintiffs here (defendants there) have filed a motion to dismiss that second-filed
5 action. [Motion to Dismiss, 2:10-15]. Again, that is not a proper basis for a motion and
6 supports plaintiff's argument for application of the First To File Rule.

7 3. That the second-filed action can determine the issues just as well as this
8 court. [Motion to Dismiss, 2:16-19]. Even leaving aside whether this is a proper basis
9 for a motion to dismiss standing alone, it is not persuasive. All courts can determine
10 issues; the issue is whether a court is the proper court in which to do so.

11 4. That there will be no delay associated with dismissal of this action since there
12 is already another action pending in the Western District of Washington. [Motion to
13 Dismiss, 2:19-22]. This, too, is not a basis for a motion to dismiss. This fact would
14 almost always occur in cases where the First To File Rule is applied.

15 5. That this suit is an anticipatory suit. [Motion to Dismiss, 3:1-2]. This
16 exception to the First To File Rule, however, requires more than the common definition
17 of "anticipation." See *Intersearch*, 544 F. Supp.2d at 960, 961.

18 6. That these parties engaged in forum shopping. [Motion to Dismiss, 3:3]. This
19 is a synonym for an "anticipatory suit" exception to the First To File Rule. *Intersearch*,
20 544 F.Supp. 2d at 962. As indicated above, it is permissible for a party to file suit
21 without waiting to be sued by the other party. See *Intersearch*, 544 F. Supp.2d at 960,
22 961. Indeed, if every dispute required a party to wait for the other side before filing a
23 lawsuit, very few lawsuits could be filed; neither party could ever file suit if each side
24 had to wait for the other. Moreover, the only evidence before the court is that all the
25 witnesses live in California, that the contracts were executed in California and that the
26 work was done in California. California is the proper forum for this action.

27
28 to dismiss the USDC case pending in the Western District of Washington.

1 Although the Motion lists six presumably independent bases, none of them
2 suffice. The Motion is therefore properly denied.

3 **E. The Forum Selection Clause**

4 Plaintiffs enter into a discussion of this topic warily. First, defendant does not use
5 the contracts' language as a basis for its motion; nothing in the Motion itself has
6 anything to do with the language of the contract. [Motion to Dismiss, 2:1-3:11].

7 Second, any insistence of the defendant on strict adherence to the contract's
8 language would be disingenuous. If they want to strictly enforce one part of the contract
9 they should strictly adhere to other parts. They do not. Both of the subject contracts
10 would require their Washington-based action to be in arbitration, not litigation.

11 However, defendant has patently ignored the contractual arbitration language for such
12 damages claims. [Exhibit D, ¶14 (lines 11-12 of that paragraph); Exhibit F, ¶13 (lines
13 11-12 of that paragraph). "[A]ny action for damages under these paragraphs shall be
14 submitted to arbitration in accordance with the provisions of this paragraph. *Id.*

15 Third, much has been made of this argument in previous pleadings in the parallel
16 District Court case, but only in the context of a discretionary motion to transfer venue
17 under section 1404(a). A detailed discussion of discretionary transfer of venue under
18 that code section would not appear warranted in this context.

19 Finally, the law here can be easily summarized. A forum selection clause
20 indicating potential application of non-California law is not enforceable in a case like the
21 one at bar. See California Practice Guide, *Employment Litigation* (Rutter) ¶14:260 *et*
22 *seq.* This case alleges that defendant violated an important public policy-based statute:
23 Business and Professions Code § 16600. The interests of California in enforcing that
24 statutory provision militate against enforcement of a forum-selection clause that would
25 strip that protection from a California resident⁶. "Parties cannot avoid Bus & Prof. C.

26
27 ⁶ In addition, reformulating the argument as just "don't sell to my former customers" is
28 still treated as a covenant not to compete. See California Practice Guide, *Employment*
Litigation, (Rutter) ¶14:300.

§16600 by including provisions designating another state's law as governing their employment agreement. . . .The 'strong public policy' underlying §16600 overrides any contractual provision designating another state's law as controlling as to the validity of a noncompete clause." *Id.* at ¶14:261.5, citing to *Application Group Inc. v. Hunter Group, Inc.* 61 Cal.App.4th 881, 902 (1998). See also, *Scott v. Snelling and Snelling, Inc.* 732 F.Supp. 1034, 1039 (N.D. Cal. 1990) ["However, California law will not give force to a choice of law clause where the contract contains a provision which violates a 'strong California public policy.'"].

F. Objections To Evidence

Plaintiffs hereby object to evidence submitted by defendant in the declaration of counsel Peter T. Petrich as follows:

- 2:18-22: This material is without factual foundation and is not relevant to the issues before the court. Nothing is explained in the Motion having anything to do with delay "or otherwise."
- 3:1-3: This is a conclusory statement unsupported by any facts; lacks foundation.
- 3:6-7: This is a conclusory statement unsupported by any facts; lacks foundation.

IX.

CONCLUSION

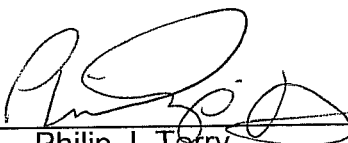
The motion to dismiss lacks factual or statutory basis. Indeed, there appears to be no mention of the operative statute - - FRCP 12(b) - - anywhere in the moving papers. As gleaned from the supporting authority, the motion is trying to apply the declaratory relief abstention doctrine to this case. However, that does not apply when the other action is currently pending in a United States District Court. Instead, the correct body of law is that surrounding the First To File Rule. Under that Rule, this action in this court is the correct forum for litigation of the issues in dispute.

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1 For reasons as stated herein, plaintiffs respectfully request that the court deny
2 the motion to dismiss.

3 Dated: April 14, 2011

CARLE, MACKIE, POWER & ROSS LLP

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5 By: 
6 Philip J. Terry,
7 Attorneys for Plaintiffs
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